No. 83-778

In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANCES WAMBHEIM AND
CATHERINE HEGGELUND, ETC., PETITIONERS

v.

J.C. PENNEY COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether respondent, which provides health insurance benefits to its employees, may permit only an employee who is a "head of household" — that is, who earns more than his spouse — to obtain health insurance for his spouse, when that practice has an adverse disparate impact on respondent's female employees.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent operates a chain of retail stores. Approximately 70% of respondent's employees are women, but the higher managerial ranks are predominately male: women hold less than 7% of the profit-sharing management positions and 35.5% of the lower-level management positions. Two-thirds of respondent's male employees hold management positions. Pet. App. 3D.

Respondent has made medical and dental insurance available to all its employees since 1955. From 1955 until 1971, however, respondent allowed only male employees to

obtain health insurance coverage for their spouses. In 1971, respondent replaced this explicit distinction with the "head-of-household" rule that is now in issue. This rule provides that only the head of a household — defined as a person who earns more than half of a married couple's earned income — can obtain health insurance coverage for his or her spouse.[1] As a result of the head-of-household rule, 89.3% of respondent's married male employees, but only 12.5% of its married female employees, can obtain health insurance for their spouses. Pet. App. 2A-3A.

2. Petitioners brought this class action on behalf of the married women employed by respondent at its 34 stores in northern California. Petitioners claimed, among other things, that the head-of-household rule constituted employment discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* They sought declaratory and injunctive relief and damages.

The United States District Court for the Northern District of California granted summary judgment for respondent (Pet. App. 1E-9E), but the court of appeals reversed (*id.* at 1D-8D; 642 F.2d 362). The court of appeals held that petitioners had established a prima facie case by showing that the head-of-household rule had a disproportionate adverse impact on women (Pet. App. 6D-7D). The court of appeals remanded to permit the district court to consider respondent's defenses and petitioner's additional claim that the rule was adopted for deliberately discriminatory purposes.

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[1] Respondent simultaneously adopted a "grandfather" clause allowing any male employee who had previously insured his wife to continue to do so, whether or not he satisfied the head-of-household criterion. Respondent abandoned this practice when this suit was brought. Pet. App. 2A.

On remand, the district court held a trial and again entered judgment for respondent (Pet. App. 1C-5C). The district court ruled that respondent had overcome petitioners' prima facie case of disparate impact by showing, in two ways, a "business justification" for the head-of-household rule. First, the court stated, eliminating the head-of-household rule would significantly increase the cost of respondent's health insurance plan.[2] Second, the district court suggested, the head-of-household rule operates to "benefit the largest number of [respondent's] employees and those with the greatest need" (*id.* at 3C). The district court explained that respondent "has concluded that its employees' * * * 'low earning' spouses * * * should be the objects of its concern and its bounty; that, conversely, its employees' higher earning spouses are much more likely to already have medical coverage from their own employers or to be able to afford to purchase it if it is not so available; and that the cost to its employees should be kept as low as possible so that those who really need and deserve coverage can obtain it" (*ibid.*). The district court also held that petitioners had failed to show that the head-of-household rule was adopted for discriminatory reasons (*id.* at 5C).

The court of appeals affirmed (Pet. App. 1A-8A; 705 F.2d 1492). It held (Pet. App. 6A) that respondent had shown the following "legitimate and overriding business justifications" for the head-of-household rule:

> [Respondent] explains that the rule is designed to benefit the largest number of employees and those with

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[2]Respondent pays 75% of the cost of the health insurance it provides to its employees; the employees contribute 25% (Pet. App. 2A). The district court stated that respondent currently pays $50 million for employee health insurance benefits and that if the head-of-household rule were eliminated, respondent's "contribution to [the] increased costs would amount to from three to five million dollars a year" (Pet. App. 3C).

> the greatest need. It concluded that * * * spouses covered under the head-of-household rule have the greatest need for dependent coverage. Qualifying spouses are less likely to have other medical insurance. It seeks to keep the cost of the plan to its employees as low as possible, so that the needy can afford coverage. If all spouses are included, the contribution rates will increase.

The court of appeals also held that the district court was not clearly erroneous in concluding that the head-of-household rule was not adopted intentionally to discriminate against women (*id.* at 7A).

DISCUSSION

1. Ordinarily a plaintiff in a Title VII action may seek relief on the basis of either a claim of "disparate treatment" — that is, intentional discrimination — or "disparate impact." See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335-336 n.15 (1977). Petitioners have not pursued their disparate treatment claim in this Court. The court of appeals, after stating that disparate impact analysis applies to respondent's head-of-household rule (Pet. App 4A), analyzed the case according to a disparate impact standard.

The logically first question is whether disparate impact analysis properly applies to petitioners' claim at all and, if so, in what form. This is an important and unresolved question, but we do not believe this case presents this Court with an appropriate vehicle for its resolution. In particular, in the specific category of Title VII suit involved here — a suit alleging sex discrimination in compensation — the Bennett Amendment to Title VII, the last sentence of 42 U.S.C. 2000e-2(h), makes available to an employer the affirmative defenses that are available under the Equal Pay

Act of 1963, 29 U.S.C. 206(d). See *County of Washington* v. *Gunther*, 452 U.S. 161 (1981). One of those defenses is that a pay differential may be based on "any other factor other than sex." Whether, and under what standards, the Bennett Amendment changes otherwise applicable Title VII analysis is an important question that this Court has not yet addressed. See *id.* at 170-171. See also *Kouba* v. *Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982).

It appears, however, that this question is not presented by this case. The district court's first opinion does use the phrase "factor other than sex" (*e.g.*, Pet. App. 8E) — which is the language from the Equal Pay Act that is incorporated in Title VII by the Bennett Amendment — but the district court did not expressly rely on the Bennett Amendment. The court of appeals' decision does not mention or rely on the Bennett Amendment. And so far as we are able to ascertain from the record, respondent did not raise this affirmative defense in its answer or preserve it on appeal. Since the issue was not explored below and probably cannot now be raised by respondent, this case does not provide an appropriate vehicle for the resolution of the question whether, and to what extent, the Bennett Amendment precludes the application of disparate impact analysis to claims of sex discrimination in compensation.

There is a distinct question, which this Court appears to have left open, whether under Section 703(a)(1) of Title VII, 42 U.S.C. 2000e-2(a)(1), "disparate-impact analysis applies to fringe benefits" at all (*Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 711 n.20 (1978); see *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 144-145 (1977)).[3] Respondent does appear to have presented this argument to

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[3]Unlike the Bennett Amendment, this defense, if it exists, would apparently apply to claims based on all forms of discrimination that are unlawful under Title VII, not just sex discrimination.

the court of appeals on the first appeal (see Appellants' Opening Br. 12-21), although in its Brief in Opposition respondent does not attempt to defend the court of appeals' decision on this ground. Since the court of appeals ruled in favor of petitioners on this issue, this case similarly does not appear to be an appropriate one for the Court to review for the purpose of addressing this question.

2. We turn, therefore, to the ground of decision in the court of appeals. Under disparate impact analysis, an employment practice that has "a significantly discriminatory impact" on a protected class (*Connecticut* v. *Teal*, 457 U.S. 440, 446 (1982)) violates Title VII unless the employer carries the burden of showing that the practice is justified by a "business necessity" (*Griggs* v. *Duke Power Co*, 401 U.S. 424, 431 (1971)). See also *Satty*, 434 U.S. at 141-143; *Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977). Respondent's head of household rule has a severe disproportionate impact adverse to women; among respondent's employees, 90% of married men but only 12.5% of married women can obtain health insurance for their spouses. Cf. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, No. 82-411 (June 20, 1983), slip op. 13-15 & n.22. The court of appeals correctly held that the rule has a statistically significant disproportionate adverse effect on women, and it is unclear whether even respondent continues to deny that the rule has such an impact. Under disparate impact analysis, therefore, the only question is whether respondent has demonstrated that the rule is justified by a "business necessity."

Both respondent and the courts below rely principally on three factors in support of the respondent's head-of-household rule: (a) cost, (b) the extent to which the rule benefits employees "who have the greatest need," and (c) the desire to limit spousal coverage to spouses less likely to be covered by their own employers' health insurance programs. But respondent failed to show that the

head-of-household rule adequately served these interests to sustain a business necessity justification. Rather, the lower courts simply observed that they were respondent's asserted justifications, and then "conclude[d] that these are legitimate and overriding business justifications for the head-of-household rule." (Pet. App. 6A).[4]

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[4]The Equal Employment Opportunity Commission has issued a guideline condemning head-of-household rules as presumptively unlawful under Title VII. 29 C.F.R. 1604.9(c). The Department of Labor, when it was responsible for enforcing the Equal Pay Act, 29 U.S.C. 206(d), issued a similar regulation, interpreting that statute, which is of relevance to Title VII litigation (see pages 4-5, *supra*):

> Sometimes differentials in pay to employees performing equal work are said to be based on the fact that one employee is head of a household and the other, of the opposite sex, is not. In general, such allegations have not been substantiated. Experience indicates that where such factor is claimed the wage differentials tend to be paid to employees of one sex only, regardless of the fact that employees of the opposite sex may bear equal or greater financial responsibility as head of a household or for the support of parents or other family dependents. Accordingly, since the normal pay practice in the United States is to set a wage rate in accordance with the requirements of the job itself and since a "head of household" or "head of family" status bears no relationship to the requirements of the job or to the individual's performance on the job, the general position of the Secretary of Labor and the Administrator [of the Wage and Hour Division, Employment Standards Administration, of the Department of Labor] is that they are not prepared to conclude that any differential allegedly based on such status is based on a "factor other than sex" within the intent of the [Equal Pay Act].

29 C.F.R. 800.149. The EEOC has proposed a similar regulation interpreting the "factor other than sex" defense of the Equal Pay Act to exclude head-of-household rules. 46 Fed. Reg. 43852 (1981).

Neither the guideline nor the regulations specifically address the business necessity issue that was the basis of the ruling of the court of appeals.

We note, in addition, that these guidelines and regulations — and the question presented by this case — are distinct from "the controversial concept of 'comparable worth,' under which plaintiffs might claim

a. The simple fact that additional cost would be incurred if respondent abandoned its head-of-household rule is insufficient justification for retention of that rule. Otherwise, any rule having disparate impact could satisfy the business necessity standard. Additional costs would be incurred if respondent simply extended its existing health insurance plan to the spouses of all employees who sought such benefits. But this would not be the only option available if the head-of-household rule were invalidated. An employer could, if it chose, provide a different, less costly package of health insurance benefits to all spouses (or to all employees), thereby offsetting the cost of extending benefits to the spouses of employees who are not heads of households. In other words, this case concerns not the total cost of respondent's health insurance plan but the way in which the benefits of that plan are distributed among respondent's employees; respondent is free to provide health insurance that has the same overall cost as its current plan, so long as it does not distribute benefits in a way that greatly favors male employees but is not justified by a business necessity. See generally *Liberles* v. *County of Cook*, 709 F.2d 1122, 1132-1133 (7th Cir. 1983).

b. Neither is it obvious that respondent's head-of-household rule gives greater benefits to employees who "have the greatest need" (Br. in Opp. 3) or who are the most worthy "objects of [respondent's] concern and its bounty" (Pet. App. 3C). If respondent's objective was to funnel

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increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community" (*Gunther*, 452 U.S. at 166 (footnotes omitted)). Respondent does not claim, and cannot plausibly claim, that its head-of-household rule is based on " 'a bona fide job rating system' " (109 Cong. Rec. 9209 (1963) (statement of Rep. Goodell), quoted in *Gunther*, 452 U.S. at 171; see *id.* at 170-171 n.11; *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 199-201 (1974)); the head-of-household rule makes no reference to an employee's job.

benefits to the families of its less well-off or less well-paid employees, it could simply have provided increased benefits to employees, or employee families, earning less than a certain amount. The head-of-household rule does not function in this way; it permits families with high incomes to obtain spousal benefits (if the member of the family employed by respondent earns more than his spouse) while disqualifying families with low incomes (if the member of the family employed by respondent earns less than his spouse).

c. It seems doubtful that the head-of-household rule effectively confines health insurance coverage to spouses who are less likely to be able to obtain health insurance through their own employers. In any event, respondent has failed to show that the rule in fact serves this purpose. Respondent had the burden of proving that its rule is justified by a business necessity (see, *e.g.*, *Dothard*, 433 U.S. at 329 (quoting *Griggs*, 401 U.S. at 432)), and the court of appeals and the district court cited no evidence suggesting that the head-of-household rule accurately identifies the spouses who are likely to lack health insurance coverage of their own.[5] The courts below appear simply to have accepted respondent's assertions to this effect, instead of requiring respondent to prove its case.

For example, respondent and the courts below appear to assume that there is a rough correlation between a spouse's earned income and his ability to obtain health insurance through his employer. That correlation may exist, although it appears on this record that respondent has not carried its burden of proving the correlation. But as we have explained, it is not self-evident that the head-of-household rule takes

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[5] *Dothard* also clarifies that the plaintiff may prove, relevant to the business necessity issue, that other non-discriminatory alternatives are available to the employer. 433 U.S. at 329.

advantage of any such correlation; under that rule, some spouses with high incomes are eligible for respondent's health insurance (if they are married to employees with even higher incomes), and some spouses with low incomes are ineligible for respondent's health insurance (if they are married to employees with lower incomes). And the courts below cited no evidence suggesting that the respondent's head-of-household rule accurately identifies low-income spouses in the particular circumstances of this case.

In addition, under disparate impact analysis, even if respondent showed that its rule serves a business necessity, the "plaintiff may prevail, if he shows that the [defendant] was using the practice as a mere pretext for discrimination." *Connecticut* v. *Teal*, 457 U.S. 440, 447 (1982). In this regard, the plaintiff may also prove that "other selection devices without a similar discriminatory effect [that] would also 'serve the employer's legitimate interest' " (*Dothard*, 433 U.S. at 329, quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975)).

The alternatives available to respondent were adverted to below, but they do not appear to have been the subject of proof or findings. For example, the proceedings below do not appear to have explored whether respondent could have dealt directly with the matter by adopting a straightforward rule that spouses who can obtain health insurance from their own employers are ineligible for coverage under respondent's plan. According to trade journals, other employers have adopted just such a rule. See *Coping With Inter-Company Cost Shifting*, 5 Benefits News Analysis 5,8 (Jan. 1983). Such a rule would promote respondent's asserted objective far more efficiently than the head-of-household rule.

In this case the district court found against the petitioners on the pretext issue, the court of appeals held that this determination was not clearly erroneous, and petitioners does not seek review of that determination.

3. For the foregoing reasons, the courts below failed to require proof of business necessity adequate to satisfy Title VII's standards. Whether this case warrants the Court's review is a much closer question. The court of appeals' failure to insist on an adequate demonstration of business necessity is inconsistent with the approach other courts of appeals have taken in applying disparate impact analysis under Title VII.[6] Because no other court of appeals has considered a head-of-household rule, however, there is no direct conflict among the circuits. While we cannot say that head-of-household rules are commonplace, respondent overstates the matter when it suggests (Br. in Opp. 7) that its rule is nearly unique; there is testimony in the record that other employers have similar rules (see Tr. 247-248, 310). The Equal Employment Opportunity Commission advises us that it has brought a suit, which is pending, challenging a similar rule used by the employer of 14,000 employees (*EEOC* v. *John Hancock Mutual Life Insurance Co.*, Civ. No. 75-39-35-MCN (D. Mass.)) and that charges involving three other employers with similar rules, whose practices

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[6]See, *e.g.*, *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971); *Liberles* v. *County of Cook*, 709 F.2d 1122, 1132 (7th Cir. 1983); *Hawkins* v. *Anheuser-Busch, Inc.*, 697 F.2d 810, 815-816 (8th Cir. 1983); *Rowe* v. *Cleveland Pneumatic Co.*, 690 F.2d 88, 93-94 (6th Cir. 1982); *Jackson* v. *Seaboard Coast Line R.R.*, 678 F.2d 992, 1016-1017 (11th Cir. 1982); *Williams* v. *Colorado Springs, Colorado School District*, 641 F.2d 835, 840-842 (10th Cir. 1981); *Blake* v. *City of Los Angeles*, 595 F.2d 1367, 1376-1378 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980); *Kinsey* v. *First Regional Securities, Inc.*, 557 F.2d 830, 837 (D.C. Cir. 1977); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 245-247 (5th Cir. 1974); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971).

potentially affect more than 2,000 employees, are pending before the Commission.

The Commission has also brought suit against respondent itself under Title VII in the United States District Court for the Eastern District of Michigan, seeking damages and a nationwide injunction against the operation of the head-of-household rule. Should the Commission prevail in that litigation, the particular rule that is at issue here will be modified. In that case, the district court has dismissed the disparate impact claim and the case will soon be tried on the theory that respondent adopted the head-of-household rule for discriminatory reasons. If, as we believe likely, the Commission is able to prove in that case that the rule amounts to a purposefully discriminatory device to perpetuate respondent's prior explicitly sex-based rule (see pages 1-2, *supra*), the question of the continuing validity of respondent's particular rule will be resolved on that basis.

Moreover, as we have noted, certain factual issues relevant to the business necessity defense were not meaningfully explored in this case, making it an imperfect vehicle for resolving the business necessity issue. Perhaps most important, the question whether, or in what way, disparate impact analysis applies to claims of sex discrimination in compensation (or perhaps to any claims involving fringe benefits) is, as we noted, not yet resolved, and it appears that this question should not be resolved in this case. The court of appeals' application of the business necessity test, while erroneous, appears as a practical matter to affect only claims of sex discrimination in compensation — the very category of claims covered by the Bennett Amendment. Should this Court ultimately determine that disparate

impact analysis is inappropriate or requires modification in this area, the prospective significance of the court of appeals' decision would be limited.

Respectfully submitted.

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